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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 297

MRS. IRIS CHRISTINE BERGHOLM ET AL.,
PETITIONERS,

VS.

PEORIA LIFE INSURANCE COMPANY OF
PEORIA, ILL., RESPONDENT.

PETITION OF PETITIONERS FOR REHEARING.

TOM CONNALLY,
Washington, D. C.,
E. L. KLETT,
Lubbock, Texas,
Counsel for Petitioners.

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Under U. S. Supreme Court decisions insured had reasonable time, measured by *"circumstances"* of this *"particular case,"* in which to make proof of disability under stipulation requiring such proof to be furnished as condition precedent to liability, and where evidence shows that before a reasonable time expired (to-wit, in three days after such disability), insurer notified insured policy lapsed, disability benefits not forfeited 1-4

SECOND GROUND—

Under Texas Statute, and Supreme Court decision construing same (existing when policy was delivered in Texas), to effect insured has reasonable time (in any event not less than 90 days), in which to furnish proof under a policy stipulation requiring such proof to be furnished as condition precedent to liability, disability benefits were not forfeited where insurer immediately notified insured, in three days after such disability, that policy was lapsed 4-6

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MAY IT PLEASE THE COURT:

Come now the above named petitioners, Mrs. Iris Christine Bergholm and Miss Adel Bergholm, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

First Ground.

The Honorable Supreme Court having held in this case that "there is evidence in the record from which

it may reasonably be found that the insured was totally and permanently disabled from a *time* before the premiums first became in arrears" on September 27, 1927, (when grace period expired), and the trial court having the right to find from the evidence that *such disability became total and permanent just one day before said expiration date* (R. 109; 149-161), and that before insured had a reasonable time for making proof thereof, in fact, immediately, to-wit, September 29, 1927, October 17, 1927, and November 10, 1927, (R. 121-2) the insurer wrote the insured the policy was lapsed, (thereby estopping insurer from claiming forfeiture for failure to make proof thereafter), the Honorable Supreme Court erred in not sustaining petitioners' "specification of error," page 10 of their petition for writ of certiorari, to the effect the Honorable Circuit Court erred in holding that the Disability Benefit Clause (providing for proof *after* disability, as well as *before* default) required furnishing such proof *before* default, as a condition precedent, instead of holding, as it should have held, under the decisions of this Court, that, *after* such disability, insured had a reasonable time (measured by "*circumstances*" of this "*particular case*") in which to furnish such proof.

The point is that, where a contract provides for performance *after* the happening of a future act, the quickest time in which the parties or the law could expect performance would be a reasonable time after the happening of such future act.

If the insured purchased certain benefits obtainable upon proof of disability, which proof it was not humanly possible to furnish until *after* the happening of such disability, will the law forfeit such benefits by denying insured opportunity to make such proof?

Hence, it is respectfully submitted that, if it be the law that, under the *"circumstances"* of this *"particular case,"* the insured had a reasonable time under such Disability Benefit Clause in which to make the proof, and that before such reasonable time expired the insurer notified the insured the policy was lapsed, the benefits were not forfeited, under the finding of this Court that the total and permanent disability of insured "continued until his death."

The construction of such stipulations requiring the furnishing of proof of claim as a condition precedent to liability has been before this Court many times. In *St. Louis etc. Ry.* v. *Starbird,* 243 U. S. 604, 61 L. Ed. 925, this Court, in reviewing its own decisions, found that:

> "Stipulations of this character have not infrequently been inserted in bills of lading, and, WHERE REASONABLE in their terms, have been sustained by this court * * * *Whether* such stipulations are *reasonable* or not depends on the CIRCUMSTANCES of EACH CASE * * * What constitutes reasonable time in which notice may be required must depend on the nature of the freight."

In *The Queen of the Pacific,* 180 U. S. 49, 45 L. Ed. 419, this Court, in passing upon the construction of a provision requiring "claim" to "be presented to the company within thirty days," etc., correctly noted that:

"Similar stipulations requiring notices of losses to be given to common carriers, express companies, telegraph and *insurance companies* have so often been upheld by the courts, WHEN REASONABLE, that a review of the cases is unnecessary."

Thereupon this Court declared the rule as follows:

"The question is whether, under the CIRCUMSTANCES of the PARTICULAR CASE, the requirement be a *reasonable one* or not. * * * It is unnecessary to say that if, under the CIRCUMSTANCES of a PARTICULAR CASE, the stipulation were *unreasonable* or worked a manifest injustice to the libellants, we should *not give it effect.*" *The Queen of the Pacific,* 180 U. S. 49, 45 L. Ed. 419.

Likewise, in *Georgia etc. Ry.* v. *Blish Milling Co.,* 241 U. S. 195-6, 60 L. Ed. 952, Chief Justice Hughes observed that it is "competent" for the parties "to agree upon *reasonable notice* of the claim as a condition of liability."

This rule of "public policy" upholding provisions for notice, proof, or report of loss, damage or disability, as conditions precedent to liability, "if reasonable," is not only recognized by courts, State and National, 10 C. J. 330-331, but in many instances regulated by statute, as in Texas, where claimant is allowed not less than 90 days in which to make proof, as shown by next ground of this motion.

Second Ground.

Under Article 5546, Texas Revised Statutes of 1925, and Texas Supreme Court decision construing

same, *in effect when policy sued on was delivered in Texas* (R. 14, 15, 24, 34, 129, 132, 167), and by which law said policy must be governed, (*Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 69 L. Ed. 342), such stipulation requiring furnishing of claim as condition precedent to liability is not valid, unless reasonable, and any stipulation fixing time at less than 90 days is void.

The Texas statute reads in part:

> "Art. 5546. No stipulation in a contract requiring notice to be given of a claim for damages as a *condition precedent* to the right to sue thereon shall ever be valid unless such stipulation is *reasonable.* Any such stipulation fixing the time within which such notice shall be given at a less period than *ninety days* shall be *void,*" etc.

As to whether said statute applies to *proof* of claim as well as *notice* of claim in *insurance* cases was settled by Texas Supreme Court, in 1925, in *American Surety Co.* v. *Blaine*, 115 Texas 147; 277 S. W. 619, holding that such statute applies to *proof* of claim, and that a provision in a policy requiring proof of loss within *sixty days* is void.

In that case, the *Court of Civil Appeals*, 272 S. W. 829, had first held:

> "The stipulation was a valid one, and compliance with it, unless waived by appellant, was a *condition precedent* to a right in appellee to maintain the suit * * * We think the statute does not affect the stipulation, which was for *proof* of loss, and not for *notice* of loss."

But, on petition for writ of error, the *Supreme Court disagreed* with the Court of Civil Appeals, and *held*:

> "We do not agree, however, with the Court of Civil Appeals that the clause in the policy providing for *proof* of loss to be furnished to the home office of the company within sixty days is not in violation of Revised Statutes of 1925, Art. 5546."

Doubtlessly, the State Supreme Court reasoned that since furnishing *proof* of loss is a more onerous proceeding than furnishing *notice* of loss, (and that furnishing *proof* of a fact necessarily includes *notice* thereof), the law prohibiting a policy provision requiring *notice* of loss in less than a reasonable time, (and in any event not less than 90 days) applies with equal force to one requiring performance of a more onerous act, namely, *proof* of loss.

Therefore, it is respectfully submitted that, under either ground, where the trial court had the right to find that the disability became total and permanent just one day before the grace period expired, and that under the "circumstances" of this "particular case" a reasonable time for making proof had not expired when, only three days after disability, insurer notified insured policy was lapsed, (thereby excusing furnishing of proof thereafter), the benefits under the Disability Benefit Clause were not forfeited.

Conclusion.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals be, under further consideration, reversed, and that of the District Court affirmed.

Respectfully submitted,

TOM CONNALLY,
Washington, D. C.,
E. L. KLETT,
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Counsel for Petitioners.

Certificate of Counsel.

I, E. L. Klett, counsel for the above named petitioners, do hereby certify that the foregoing Petition for a Rehearing of this case is presented in good faith and not for delay.

.....
Counsel for Petitioners.